

MONTANA DEPARTMENT OF JUSTICE
HB 548: Clarifying Revocation Court Authority To Revoke Based Upon
Petitions Filed Before the Suspended or Deferred Term Begins

Background

On January 26, 2011, the Montana Supreme Court decided *State v. Stiffarm*, 2011 MT 9. The *Stiffarm* decision overturned a longstanding practice, dating back to at least 1977, recognizing the authority of revocation courts to revoke suspended sentences based upon a petition to revoke (PTR) filed before the suspended portion of an offender's sentence begins. *Matter of Ratzlaff*, 172 Mont. 439, 564 P.2d 1312 (1977). Former precedent, including decisions issued as recently as 2008 and 2009, reflected "the strong public policy that if a person convicted of a crime, and granted a period of probation as part of the sentence, should commit offenses of such nature as to demonstrate to the court that he is unworthy of probation, the court has the power to revoke or change the order of probation, both during the period of probation, and before the period of probation commences." *State v. Sullivan*, 642 P.2d 1008, 1011 (1982).

In *Stiffarm*, over the dissents of Justices Rice and Baker, the Court concluded for the first time that *Ratzlaff* (1977) and *Sullivan* (1982) had no bearing upon the Court's construction of § 46-18-203(2) (as amended in 1983) because *Ratzlaff* and *Sullivan* were decided before the 1983 amendment. This was misguided because the purpose of the 1983 amendment was not to deprive revocation courts of authority to address a PTR filed before the suspended term begins. Rather, the purpose of the 1983 amendment was to clarify authority to revoke after the suspended term expires, as long as the PTR is filed during the suspended term or before the term discharges. As reflected in the legislative history (attached), the 1983 amendment abrogated *Felix v. Mohler* (1981), in which the Montana Supreme Court had held that revocation courts lose authority to revoke after the suspended term expires. The language of the 1983 amendment, which is the basis for the *Stiffarm* decision, does not prohibit the filing of a PTR before a suspended term begins. Rather, a revocation--based upon a PTR filed before the commencement of the suspended term--was authorized by law and practice long before the 1983 amendment was adopted. The 1983 amendment did not attempt to change that policy.

The appellant in *Stiffarm* argued that it would be very easy for the Attorney General or the county attorneys to amend § 46-18-203(2) to state that a PTR can be filed at any time regardless of when a suspended term has commenced. And in its decision in *Stiffarm* the Court urged the Legislature to clarify and amend § 46-18-203(2) if the Court's construction did not accord with legislative intent.

HB 548 should be treated as a clarification of longstanding legislative intent.

Public Safety and Offender Rehabilitation and Accountability Often Necessitate The Filing of Petitions to Revoke Before the Suspended Term Begins.

The filing of a PTR before the suspended term begins is a common occurrence. Sex offenders, for example, are required to begin treatment while in prison and to continue intensive treatment while on probation or parole. Oftentimes, however, sex offenders refuse treatment or fail to complete in-prison treatment, rendering them ineligible for community-based treatment programs. In such cases, prosecutors must file a PTR before these untreated offenders are released back into the community. Similarly, parolees frequently commit other crimes or violate the conditions of their parole before the commencement of a suspended term. In these cases, the same conduct supporting revocation of parole supports revocation of the suspended sentence.

These offending prisoners and parolees are often serving or required to serve more than one sentence because they committed multiple criminal offenses. Revocation of suspended sentences in such cases is the most prompt, efficient, and cost-effective way to protect the public and encourage offender rehabilitation.

Examples of circumstances requiring the filing of a PTR before a suspended term begins are found in reported decisions of the Montana Supreme Court, including in *Stiffarm* itself and the cases it overrules. In *State v. Vallier*, 2000 MT 225, for example, the Court concluded that a Sex Offender who failed to complete treatment while in prison could be revoked before his suspended term began. In *Christofferson v. State*, 901 P.2d 588 (1995), the defendant's parole and suspended sentence for Burglary were revoked prior to the commencement of the suspended sentence due to violations while on parole. In *State v. Morrison*, 2008 MT 16, a recidivist offender violated while serving his initial 13-month commitment for Felony DUI. In *State v. LeDeau*, 2009 MT 276, an offender serving a Sexual Assault sentence was released on parole a few months before his suspended term commenced. His parole and suspended sentence were revoked for multiple violations, including having unapproved contact with his 17-year-old daughter and being suspended from his sex offender treatment program. All of these cases were overruled by *Stiffarm*, which involved a PTR filed four days before *Stiffarm* was to begin serving a consecutive sentence for Failing to Register as a Violent Offender.

Clarifying Revocation Court Authority to Address Early-Filed Petitions to Revoke Will Circumvent Anticipated Appeals and Postconviction and Habeas Filings.

The *Stiffarm* decision will likely apply to any offenders whose cases were pending in district court or on appeal when *Stiffarm* was decided. The Attorney General's Office is aware of several pending cases. HB 548 will prevent these offenders, including sex offenders who have failed or refused to complete in-prison treatment, from being released into the community.

Prosecutors have been filing early PTRs since at least 1977. Thus, *Stiffarm* will also result in the filing of a significant and potentially large number of postconviction and habeas petitions alleging illegal revocations. Though *Stiffarm* does not address whether the decision is retroactive on collateral review, the Montana Supreme Court would ultimately have to decide whether offenders revoked under prior law are entitled to be sentenced according to *Stiffarm*. Even if these postconviction/habeas claims were rejected, however, handling them would require the expenditure of considerable time and resources by county attorneys, the Attorney General's Office, the Department of Corrections, district court judges, and the Montana Supreme Court.

HB 548 Addresses the Montana Supreme Court's recent decision in *Stiffarm* by:

- Accepting the Montana Supreme Court's urging that the Montana Legislature amend and clarify the meaning and intent of § 46-18-203(2)
- Approving revocation practices which have been followed by prosecutors, the criminal defense bar, district court judges, and the Montana Supreme Court for over thirty years
- Relieving the criminal justice system of the time and expense of addressing claims by convicted persons whose sentences were revoked based upon longstanding law

HB 548 promotes public safety and encourages offender rehabilitation by:

- Requiring offenders to suffer relatively prompt consequences for violating or committing more crimes while in prison or on parole
- Removing an incentive for offenders to violate when they are close to discharging their prison sentences or time on parole
- Requiring offenders to undertake meaningful efforts to treat and rehabilitate themselves before they are placed on probationary supervision
- Removing recidivist violators and offenders, including untreated sex offenders, from the community

was concerned with the constitutionality that no property shall be taken without just compensation but advised this would be discussed at a later time.

There being no further discussion, the hearing was closed.

CONSIDERATION OF SENATE BILL 393: Senator Daniels advised that his witness was still not available and requested that the hearing be deferred until February 18. The Committee acknowledged this request.

CONSIDERATION OF SENATE BILL 409: Senator Berg advised that he was sponsoring this bill at the request of the Department of Justice and introduced Margaret Johnson who would present the bill.

PROPOSERS: Margaret Johnson, an Assistant Attorney General, advised that SB409 will amend Section 46-18-203 by removing the phrase "during the period of the suspended sentence or deferred imposition of sentence." It will also add a new subsection which will permit the court to retain jurisdiction even after the suspended or deferred imposition has run, if a petition is filed within the period of the suspension or deferral. This bill will clarify the law in regards to requiring a petition. (See written testimony Exhibit "C") A proposed amendment was also distributed which would amend the title to reflect the changes in the bill.

There being no further proponents, no opponents, and no questions from the Committee, the hearing was closed and moved into executive session.

ACTION ON SENATE BILL 409: Senator Galt moved to adopt the amendments as proposed. This motion passed unanimously. Senator Mazurek moved SB409 DO PASS AS AMENDED. This motion also passed unanimously.

CONSIDERATION OF SENATE BILL 433: Senator Brown, sponsor of this bill, advised that it revises the laws concerning property exempt from execution. Professor McDonald at the Law School felt there was a need to update these laws and therefore has rewritten this section of the Code. Because of the short notice given for the hearing, Professor McDonald was unable to be present to testify. Therefore, Senator Brown requested that the hearing be deferred until February 18. The Committee acknowledged this request.

The Chairman announced that the Committee was ready to consider executive action on several bills previously heard.

EXHIBIT "C"
February 17, 1983

TESTIMONY OF MARGARET M. JOYCE JOHNSON

ASSISTANT ATTORNEY GENERAL

REGARDING SENATE BILL 409

Section 46-18-203 of the Montana Code Annotated in its present form permits a judge to revoke a suspended or deferred sentence "during the period of the suspended sentence or deferred imposition of sentence." That phrase was interpreted by the Montana Supreme Court in the 1981 case of FELIX v. MOHLER, 636 P.2d 830 (copy attached). The Court held that the filing of a petition to revoke the sentence during the period of the suspension or deferral was insufficient to vest the sentencing court with jurisdiction to revoke if the court was unable to act and hold a hearing before the sentence had run. Although that interpretation of the statute certainly accords with the literal wording of the statute, brief analysis shows that that could not have been the intent of the legislature in enacting that provision. Such an interpretation effectively gives probationers serving a suspended sentence or for whom imposition of sentence was deferred, a carte blanche to violate the conditions of their probation at any time during the final days of their probation because the court will be unable to hold a hearing on the petition

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even if a petition to revoke is filed during the period of suspension or deferral.

To rectify that situation, the Department of Justice has requested that Senate Bill 409 be introduced to amend Section 46-18-203 and remove from the statute the phrase "during the period of the suspended sentence or deferred imposition of sentence" which the Court interpreted in *FELIX v. MOHLER*. The bill also adds a new subsection (2) to the statute specifically permitting a sentencing court to act upon a petition to revoke either a suspended sentence or a deferred imposition of sentence even after the period of suspension or deferral has run as long as the petition is filed within the period of suspension or deferral.

The proposed amendment is made applicable to all petitions filed after the effective date of the act and the act is made effective upon passage and approval by the Governor. As originally proposed, the title to this bill began, "AN ACT TO CLARIFY THE LAW REGARDING THE REVOCATION OF A DEFERRED OR SUSPENDED SENTENCE . . . etc." We would propose that the title again be amended to reflect that this bill is intended to clarify what has always been the only reasonable intent of the legislature regarding revocation of a deferred or suspended sentence, i. e. (1) that anytime a probationer

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violates the conditions of his probation during the period of deferral or suspension, he is subject to having that sentence revoked, whether or not the court in question is able to hold a hearing on the petition to revoke during the period of suspension or probation and (2) that a probationer cannot with impunity violate the conditions of his probation in its final days simply because the sentencing court's calendar and the requirements of due process do not permit the holding of a hearing on the petition during the remaining days of the period of suspension of deferral or suspension. Failure to comply with the conditions of probation and prompt action by the State in petitioning the sentencing court to revoke the suspension or deferred imposition of sentence should suffice to permit the sentencing court to act on the merits of that petition and revoke the sentence if the claimed violations of probation are found to have occurred.

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2-17-83
AARON FELIX, Petitioner,

v.

Mel MOHLER, Director, Swan River
Youth Forest Camp, for the State
of Montana, Respondent.

No. 81-340.

Supreme Court of Montana.

Submitted on Briefs Oct. 22, 1981.

Decided Nov. 12, 1981.

Habeas corpus proceeding was brought to secure release of petitioner from restraint under district court order revoking a three-year deferred sentence and imposing a three and one-half-year sentence. The Supreme Court, Morrison, J., held that statute governing revocation of suspended or deferred sentence grants jurisdiction to courts to revoke suspended or deferred sentences only during the period of such sentences.

Writ granted.

1. Criminal Law \Rightarrow 982.9(2)

Action by judge, magistrate, or justice of the peace to revoke suspended or deferred sentence outside the provisions of statute governing revocation of suspended or deferred sentence is without jurisdiction. MCA 46-18-203.

2. Statutes \Rightarrow 190

If statute is plain, unambiguous, direct and certain, statute speaks for itself and there is nothing left for court to construe.

3. Criminal Law \Rightarrow 982.9(2)

Statute governing revocation of suspended or deferred sentence grants jurisdiction to judges, magistrates, or justices of the peace to revoke suspended sentences or impose sentences following deferred sentences only during period of suspended or deferred sentences, regardless of whether petition for revocation has been filed prior to termination of such sentence. MCA 46-18-203.

Patterson, Marsillo, Tornabene & Schuyler, Missoula, for petitioner.

Mike Greely, Atty. Gen., Helena, Edward P. McLean, Deputy County Atty., Missoula, for respondent.

MORRISON, Justice.

Petitioner, Aaron Felix, applies for a writ of habeas corpus stemming from an order of the Fourth Judicial District Court entered on May 27, 1981. This order revoked a three year deferred sentence given petitioner on May 22, 1978 and imposed a three and one-half year sentence at the Montana State Prison upon petitioner.

Petitioner was convicted of theft, a felony, in the District Court of the Fourth Judicial District, Missoula County. On May 22, 1978, he was given a three year deferred imposition of sentence on the condition that restitution be made.

On August 20, 1979, this deferred sentence was continued and petitioner was ordered to complete restitution by November 5, 1980. Petitioner failed to comply with this order by November 5, 1980, and a petition to revoke petitioner's deferred sentence was filed on January 16, 1981. A hearing on this petition was held May 27, 1981, three years and five days after the initial deferral.

At this hearing, petitioner moved to dismiss the proceeding on the grounds that the District Court was without jurisdiction. The District Court overruled petitioner's objection concluding that the Court retains "... jurisdiction (when) the petition is filed within the (deferral) time."

The District Court sentenced petitioner to three and one-half years in the Montana State Prison. Petitioner has been incarcerated since, either at the Montana State Prison or the Swan River Youth Forest Camp.

Petitioner raises the following issue:

1) Whether a District Court retains jurisdiction to revoke a deferred imposition of sentence beyond the time period of deferral if a petition to revoke is timely filed?

In *State v. Porter* (1964), 143 Mont. 528, 540, 541, 391 P.2d 704, 711, this Court stated that:

"[t]his state is committed to the doctrine that once a valid sentence has been pronounced, the court imposing the same is lacking in jurisdiction to vacate or modify the sentence, except as otherwise provided by statute ..." (Emphasis added.)

[1] Section 46-18-203, MCA, is a specific procedural statute granting judges, magistrates, or justices of the peace authority to revoke a suspended sentence or impose sen-

tence following a deferred imposition of sentence. Section 46-18-203, MCA, provides:

"Revocation of suspended or deferred sentence. A judge, magistrate, or justice of the peace who has suspended the execution of a sentence or deferred the imposition of a sentence or imprisonment under 46-18-201 or his successor is authorized, *during the period of the suspended sentence or deferred imposition of sentence, in his discretion, to revoke the suspension or impose sentence and order the person committed.* He may also, in his discretion, order the prisoner placed under the jurisdiction of the board of pardons as provided by law or retain such jurisdiction with his court. Prior to the revocation of an order suspending or deferring the imposition of sentence, the person affected shall be given a hearing." (Emphasis added.)

This authority must be exercised in accordance with the precise provisions of this section; action by a judge, magistrate, or justice of the peace outside the provisions of

Section 46-18-203, MCA, is without jurisdiction. *State v. Porter*, supra.

The controlling language in Section 46-18-203, MCA, is "... during the period of such suspended sentence or deferred imposition of sentence..." Determining the meaning of this phrase disposes of this petition.

[2,3] It is well settled that if a "... statute is plain, unambiguous, direct and certain, the statute speaks for itself and there is nothing left for the court to construe." *Shannon v. Keller* (1980), Mont., 612 P.2d 1293, 1294, 37 St.Rep. 1079, 1081. Such is the case before this Court. The words "during the period" are extremely plain and unambiguous. The clear import is that a court is vested with jurisdiction to revoke a suspended or deferred sentence *only* during the running of the suspended or deferred sentence. Once such time has expired a court is without jurisdiction to decide petitions for revocation filed by the State.

The State requests this Court to construe Section 46-18-203, MCA, to mean that a timely filed petition for revocation vests jurisdiction in the Court, regardless whether the hearing on such petition is held after the suspended or deferred sentence has ex-

pired. The State relies on decisions from Nevada and Oklahoma in support of this contention. See *Sherman v. Warden, Nevada State Prison* (1978), Nev., 581 P.2d 1278; *Degraffenreid v. State* (1979), Okl.Cr., 599 P.2d 1107.

These authorities are not in point. Nevada and Oklahoma have statutory provisions which vest jurisdiction in the courts for purposes of revocation of suspended or deferred sentences upon the filing of a petition for revocation. Therefore a timely filed petition of revocation in these states vests jurisdiction in courts when the time of the suspended or deferred sentence has run.

Montana's statute pertaining to revocations of suspended or deferred sentences, Section 46-18-203, MCA, contains no language stating that a timely filed petition for revocation invokes a court's jurisdiction over these matters. It is axiomatic that this Court cannot insert what the legislature has not statutorily included. Section 1-2-101, MCA.

In conclusion, we hold that Section 46-18-203, MCA, grants jurisdiction to judges, magistrates, or justices of the peace to revoke suspended sentences or impose sentences following deferred sentences *only* during the period of the suspended or deferred sentences. This jurisdiction extends only through the running of the suspended or deferred sentence, regardless of whether a petition for revocation has been filed prior to the termination of the suspended or deferred sentence.

Therefore, petitioner's request for a Writ of Habeas Corpus is granted. It is hereby ordered that such writ issue immediately and that petitioner be discharged from the custody of the Swan River Youth Forest Camp.

HASWELL, C. J., and DALY, HARRISON and SHEA, JJ., concur.